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No. 97-2057

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

JAMES DANNER — PETITIONER

versus

COMMONWEALTH OF KENTUCKY — RESPONDENT

On Petition for Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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JAMES DANNER **PETITIONER**

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COMMONWEALTH OF KENTUCKY **RESPONDENT**

The Attorney General of the Commonwealth of Kentucky as counsel for Respondent states in opposition to James Danner's Petition for Writ of Certiorari to the Supreme Court of Kentucky as follows:

COUNTERSTATEMENT OF THE CASE

On February 9, 1996, the Boyd County Grand Jury returned an indictment charging petitioner, James Danner, with two counts of first degree sodomy and one count of first degree rape. (TR I, 11-13). Petitioner entered a plea of not guilty (TR I, 18-19) and was tried by a jury in November, 1996.

Prior to the trial of petitioner's case, the Commonwealth moved to allow the victim, petitioner's daughter, to testify outside of

the presence of the defendant pursuant to Ky. Rev. Stat. 421.350. (TR II, 40). In support of its motion, the Commonwealth asked the trial court to conduct an in camera interview with the victim in order to determine whether or not a compelling need existed to permit her testimony via closed circuit television. (TE I, 17). Petitioner opposed the Commonwealth's motion, alleging that Ky. Rev. Stat. 421.350 did not apply to S.D.[1], as she was 15 at the time of trial. (TE I, 8, 11). Further, petitioner contended that a finding of compelling necessity could not be based on an in camera interview with the victim by the trial court. (TE I, 11).

The trial court interviewed S.D. in camera. During the interview, S.D. said repeatedly that she would not be able to testify in the presence of the defendant:

> Q. Do you think you could get up there on the witness stand and answer the lawyers questions in there -- right in there in court like -- just like a grown up would do?
>
> A. No.

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[1]In keeping with the policy of the Office of the Attorney General and the Kentucky Supreme Court, the victim of sexual offenses will be referred to only by her initials in order to protect her identity.

> Q. You don't think you can do it?
>
> A. No.
>
> . . .
>
> Q. Is it something other than just being nervous or what is it about being in the room with him?
>
> A. I just can't stand to be in a room with him.
>
> Q. Well. It's kind of a hard thing to do. And you're telling me you don't think you could do it in there in the same room with him?
>
> A. No.
>
> Q. What do you think would happen if you tried?
>
> A. I couldn't do it.

(TE I, 57-58).

Based on the in camera interview with S.D., the trial court granted the Commonwealth's motion and permitted S.D. to testify by closed circuit television, finding that denial of the motion would inhibit the jury's search for the truth. The trial court stated, in pertinent part:

> And although I'm not making this decision simply for the witness's convenience, or to prevent her from being nervous or anxious, as that no doubt happens to all witnesses, the Court is convinced that due to the

> nature of the testimony and the age of the witness that face-to-face arrangement would inhibit the witness to such a degree that the jury's search for the truth would be clouded.

(TE I, 60).

At trial, S.D. testified that petitioner began to have sex with her when she was five years old. On some occasions, petitioner would come into her room while she was sleeping, take off her clothes, force her legs apart and put his penis into her vagina. On one occasion, petitioner took S.D. and her brother, Michael, for a drive. Parking on a deserted road, petitioner told Michael to stay at the car and pick up some glass in the road while petitioner and S.D. went for a walk. Petitioner then took S.D. behind some bushes and raped her. S.D. testified that she tried to call out for help, but petitioner put his hand over her mouth. (Videotape Exhibit).[2]

In addition to raping S.D., petitioner also sodomized his daughter, both orally and anally. S.D. testified that on at least one

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[2]The testimony of S.D. is not transcribed in the record of this case. It appears on a videotape as an exhibit. Unfortunately, the tape does not contain a counter from which specific citations can be taken. As such, the Commonwealth can only cite to the tape as a whole for references to S.D.'s testimony.

occasion petitioner sent Michael out of the house. Alone with S.D., petitioner told the child to go into the bedroom, followed her there, and put his penis into her mouth. On another occasion, while her mother was gone and Michael was out of the house, S.D. climbed on a table in an attempt to get away from petitioner. Petitioner held her down and inserted his erect penis into her anus. S.D. testified that this caused her quite a bit of pain and some bleeding. She screamed, but no one heard her. (Videotape Exhibit).

S.D. told the jury that petitioner sexually abused her from the time she was five until he moved out of the house when she was nine years old. Petitioner told S.D. that having sex with her was the only way he could love her. (Videotape Exhibit).

Dr. Ann Craig, a pediatrician, examined S.D. after S.D. disclosed that she had been raped and sodomized by petitioner. Dr. Craig's examination revealed deep clefts in the hymen. These findings were consistent with a penetrating injury occurring before the onset of puberty. (TE I, 78).

Following the close of the Commonwealth's case, petitioner asked for an additional finding by the trial court regarding the

compelling need for application of Ky. Rev. Stat. 421.350. The trial court again explained why it was necessary to allow S.D. to testify via closed circuit television:

> I'll rule again, as I did before, that I -- I believe that probably the best way to do that -- and if I'm wrong about this, I'm sure I'll be corrected, but I believe the best way to make that determination is with an in camera interview of the child. And once that is accomplished, I think it's one of those areas where the trial court has to use its discretion. . . . I tried real hard to get her to testify the conventional way. Keeping in mind now I wasn't letting her dictate to the Court whether we were going to go under 421.350 or whether we were going to go the old fashion [sic] way. Wasn't let her dictate that at all. I was trying to persuade her in that direction to see how resistant she was to it. Because I thought that was a pretty good barometer of whether or not it could be done. . . . I mean it just was very obvious to me that if I didn't apply the procedures that was spelled out there in 421.350 that the Commonwealth wasn't even going to be able to put on their side of the case. And believe me, I did it as a last resort. . . and there isn't any doubt in my mind that this was one of the -- if it's ever appropriate, it was appropriate this time.

(TE I, 149-150).

Petitioner was convicted of one count of rape in the first degree and two counts of sodomy in the first degree. He was sentenced to 24 years on each count, said sentences to run

concurrently for a total of 24 years imprisonment. Final judgment was entered on December 16, 1996. (TR III, 121-123).

Petitioner sought review of his conviction in the Kentucky Supreme Court. Petitioner based his plea for reversal on the trial court's decision to allow S.D. to testify via closed circuit television. Specifically, petitioner contended (a) that the trial court erred in allowing a 15 year old victim to testify by closed circuit television; (b) that the in camera interview with the victim did not form a sufficient evidentiary basis to support the trial court's ruling allowing testimony by closed circuit television; and (3) that the use of closed circuit television violated petitioner's Sixth Amendment right to confront his accuser.

In a published opinion rendered February 19, 1998, the Kentucky Supreme Court unanimously affirmed petitioner's conviction, finding that the trial court properly allowed S.D. to testify via closed circuit television. Danner v. Commonwealth, 963 S.W.2d 632 (Ky. 1998). With respect to the age of the victim, the Court noted that the statute in question, Ky. Rev. Stat. 421.350 was designed to protect victims who are under 12 years of age at the time the crimes

against them are committed and who remain "children", i.e. under the age of 18, at the time of trial. As such, the Kentucky Supreme Court found it proper for the trial court to allow a 15 year old victim to testify via closed circuit television regarding acts which occurred when she was between the ages of five and nine. Id. at 634.

Petitioner now requests that this Court grant certiorari.

ARGUMENT

PETITIONER'S SIXTH AMENDMENT RIGHTS WERE NOT ABRIDGED IN ANY WAY BY THE APPLICATION OF KY. REV. STAT. 421.350 IN THIS CASE.

Petitioner raises three basic issues with respect the testimony of S.D. in this case. Petitioner attacks the evidentiary basis of the trial court's ruling allowing S.D. to testify via closed circuit television. Petitioner complains that the trial court erred in allowing closed circuit television testimony for a victim who was 15 years of age at the time of trial. Finally, petitioner asserts that the opinion of the Kentucky Supreme Court conflicts with decisions of this Court and the United States Court of Appeals for the Sixth Circuit. Each of

petitioner's three complaints will be addressed below, although none has any merit.

A. Federal Constitutional Standards for Closed Circuit Television Testimony - Maryland v. Craig.

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . . .

U.S. Const. amend VI. In Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), this Court considered the constitutional validity of a Maryland statutory procedure which allowed child victims of sexual abuse to testify via closed circuit television. Craig squarely presented the issue of whether face-to-face confrontation is an absolute requirement of the Confrontation Clause. The Court concluded that face-to-face confrontation, while preferred, must "'occasionally give way to considerations of public policy and the necessities of the case.'" 497 U.S. at 849 (citations omitted). Recognizing a legitimate state interest in the protection of child

witnesses, the Court approved the use of special procedures which allow a child to testify without face-to-face confrontation:

> Accordingly, we hold that, if the State makes and adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

Id. at 854.

The finding of necessity to invoke the special closed circuit television procedures must be case specific, requiring a finding by the trial court that special procedures are necessary to protect a particular child witness. Id. The trial court must find that it is the presence of the defendant that would traumatize the child and that the emotional distress would be more than de minimis. 497 U.S. at 855-856.[3]

[3]The Court specifically declined to establish a minimum level of trauma required for the use of closed circuit television. However, the Court noted that Maryland's standard, requiring a trial court determination that the child will suffer "'serious emotional distress such that the child cannot reasonably communicate,'"(citation omitted) was sufficient to pass constitutional muster. Id. at 856.

Concluding its analysis of the Maryland procedures in the context of the Confrontation Clause, the Court stated:

> So long as a trial court makes such a case-specific finding of necessity, the Confrontation Clause does not prohibit a state from using a one way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case.

Id. at 860.

B. Kentucky's Closed Circuit Television Statute - Ky. Rev. Stat. 421.350.

Kentucky, like Maryland, has enacted a statute designed to advance the legitimate state interest in the protection of children who have suffered or witnessed acts of sexual assault. Ky. Rev. Stat. 421.350 operates to allow child victims and witnesses of certain crimes to testify outside the presence of a defendant upon a showing of "compelling need." The definition of "compelling need" is set forth in Ky. Rev. Stat. 421.350(5):

> "[C]ompelling need" is defined as the substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced by the defendant's presence.

The statute was enacted, much like the one in Maryland, because the Kentucky General Assembly felt the protection of child victims was a legitimate state interest:

> Our legislature, after extensive public hearings on the matter of child sex abuse and responding to a plea for witness protection, has accepted the philosophy that testifying in a formal court room atmosphere at a criminal trial before the defendant, judge and jury can be one of the most intimidating and stressful aspects of the legal process for children. Exercising the legitimate right of legislative policy making, the statute in question was enacted.

Commonwealth v. Willis, 716 S.W.2d 224, 227 (Ky. 1986).

C. The Evidentiary Sufficiency of the Trial Court's Decision to Allow S.D. to Testify in Accordance With Ky. Rev. Stat. 421.350.

Petitioner complains that his Sixth Amendment rights were violated because the trial court in instant case did not take expert testimony on the level of trauma S.D. would suffer if she was forced to testify in the presence of petitioner. In making this argument, petitioner wholly ignores the fact that neither the statute at issue, Ky. Rev. Stat. 421.350 or this Court's decision in Craig require expert testimony. In Craig, the trial court made its decision solely on the basis of expert testimony. The Maryland Court of Appeals reversed

the judgment of the trial court in part because it found error in the trial court's failure to question any of the children. 497 U.S. at 859. Reversing the Maryland Court of Appeals, this Court specifically stated, "we decline to establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for the use of the one-way television procedure." 497 U.S. at 860. Contrary to petitioner's assertions, federal constitutional law does not require the taking of expert testimony.

In this case, the trial court did exactly what is dictated by Craig: conduct a case specific analysis to determine if the presence of the defendant would traumatize the particular child witness to such a degree that use of closed circuit television was necessary. S.D. testified repeatedly that it was the presence of the defendant that unnerved her. At no time did she indicate that it was the courtroom which upset her. Further, she told the judge repeatedly that she could not testify in the presence of the defendant. Far from the effect of the defendant's presence being de minimis, the trial court specifically found that the Commonwealth would not be able to present its case without using closed circuit television. The trial court

concluded that the jury's fact finding function would be impeded if S.D. was not permitted to testify outside of petitioner's presence.

In Danner v. Commonwealth, the Kentucky Supreme Court noted that the trial court had properly applied the dictates of Ky. Rev. Stat. 421.350 in determining that the closed circuit procedure was necessary:

> The trial court considered the testimony the child would give at trial, and the age of the child in making its determination. The Court stated: ". . . the Court is convinced that due to the nature of the testimony and the age of the witness that face-to-face arrangement would inhibit the witness to a degree that the jury's search for the truth would be clouded." The trial court was convinced that the victim would not be able to testify in the presence of appellant, and in the interest of presenting all evidence to the jury it made the determination of compelling need. . . .

963 S.W.2d at 635.

The trial court in this case had a sufficient evidentiary basis for concluding that closed circuit television testimony was necessary in the instant case. The Kentucky Supreme Court reviewed that decision and found that the trial court followed the requirements Ky. Rev. Stat. 421.350. Petitioner's specious arguments to the contrary should be rejected and the petition should be denied.

D. The Determination that Ky. Rev. Stat. 421.350 Applies to Victims Under the Age of 18 at the Time of Trial is A Question of State Law.

Petitioner complains that the trial court erred in allowing S.D., who was 15 at the time of trial to testify via closed circuit television. Petitioner argued to the Kentucky Supreme Court, as he does to this Court, that the statute in question, Ky. Rev. Stat. 421.350 applies only to children under the age of 12. The statute states, in pertinent part:

> This section applies only to a proceeding in the prosecution of an offense, including but not limited to an offense under KRS 510.040 to 510.150, 529.130 to 529.050, 529.070, 530.020, 530.060, 530.064, 531.310, 531.320, 531.370, and all dependency proceedings pursuant to KRS Chapter 620, when the act is alleged to have been committed against a child twelve (12) years of age or younger, and applies to the statements or testimony of that child or another child who is twelve (12) years of age or younger who witnesses one of the offenses included in this subsection.

Ky. Rev. Stat. 421.350(1). The Commonwealth argued that, for purposes of child victims, the only relevant time frame for application of the statute is when the acts are alleged to have been committed. By its express terms, the statute applies when the acts are alleged to have occurred when the victim was 12 or under. The

Kentucky Supreme Court found the statute to be ambiguous on its face, but concluded that the relevant time frame was when the acts were committed. In so holding, the Court noted that the statute would protect "child victims twelve and under when the crimes were committed and who remain children at the time of trial." 963 S.W.2d at 634(footnote omitted).[4]

Clearly, the decision of the Kentucky Supreme Court interpreting the scope of Ky. Rev. Stat. 421.350 is a question of state law over which this Court has no jurisdiction. 28 U.S.C. § 1257, in pertinent part, provides for jurisdiction over state court decisions "where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States . . . " The determination by the Kentucky Supreme Court that the Kentucky General Assembly meant the

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[4]The Kentucky Supreme Court noted that other provisions of Kentucky's statutory scheme define "child" as someone who has not attained his eighteenth birthday. Thus, the parade of horrors argument presented by petitioner, where 25 year old witnesses would be permitted to testify via closed circuit television (Petition, p. 10) simply would not happen as those witnesses would not be "children" at the time of trial. Danner, 963 S.W.2d at 634, n. 1.

statute in question to apply to children who are victimized at or before age 12 but are under 18 at the time of trial does not implicate a federal question. Because there is no jurisdiction, certiorari should be denied.

To the extent that this issue could possibly implicate the Sixth Amendment, Respondent notes that petitioner has provided this Court with no citation to authority which would indicate that the Kentucky Supreme Court's decision to apply its statute to children under age 18 violates the Sixth Amendment. Indeed, the Maryland statute at issue in Craig defines a child as a person who not yet 18 years of age. Md. Ann. Code art. 27 § 774; art. 27 §35C(a)(3) (1997). Petitioner's Sixth Amendment rights were not violated by a decision of Kentucky's highest court, construing a state statute, in a manner entirely consistent with the opinions of this Court. Certiorari should be denied.

E. The Decision of The Kentucky Supreme Court is Entirely Consistent With Relevant Precedent.

Finally, petitioner maintains that the decision of the Kentucky Supreme Court is "repugnant" to the rulings of this Court

and the United States Court of Appeals for the Sixth Circuit. (Petition, p. 12). This is ridiculous. As Respondent has already demonstrated, the decision of the Kentucky Supreme Court complies fully with the directives set forth by this Court in Maryland v. Craig. There is simply no inconsistency between the opinion in this case and the opinion in Craig. Neither the Kentucky statute at issue or the Kentucky Supreme Court's interpretation thereof abridged or denied petitioner's Sixth Amendment rights in any way.

Unable to demonstrate an inconsistency with the Craig opinion, petitioner asserts that the Kentucky Supreme Court failed to follow the Sixth Circuit case of United States v. Moses, 137 F.3d 894 (1998). In Moses, the Sixth Circuit reversed a sexual abuse conviction where the child was allowed to testify via closed circuit television. In so doing, the Court was interpreting a federal statute, 18 U.S.C. § 3509, enacted by Congress and inapplicable in the courts of the Commonwealth of Kentucky. The Sixth Circuit's conclusion that the trial court in Moses did not comply with the dictates of the federal statute simply has no bearing on petitioner's case. Certiorari should be denied.

CONCLUSION

The decision of the Kentucky Supreme Court in Danner v. Commonwealth simply does not conflict with the opinion of this Court in Maryland v. Craig. Petitioner has wholly failed to show that the statute at issue, Ky. Rev. Stat. 421.350, or its application in the instant case, violated his Sixth Amendment right to confront his accusers. As such, the petition for writ of certiorari should be denied.

Respectfully submitted,

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